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ABSTRACT

This report provides a framework for evaluating the use of performance contracts. It serves as a working guide for those who are considering or are committed to performance contracts with public or private organizations. The topics cover (1) the theoretical basis and rationale of performance contracting, (2) the procurement model and the request for proposal (RFP), (3) considerations in selecting a contractor, (4) the contract, (5) third party functions, and (6) legal considerations. (Author/JF)

An Upper Midwestern Region Interstate Project Publication

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a guide to performance contracting

Wisconsin Department of Public Instruction
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A GUIDE TO PERFORMANCE CONTRACTING

A Presentation and Discussion of the
Multiple Considerations Regarding Contracted Services
In Local Education Agencies

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Wisconsin Department of Public Instruction
Madison 1971

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Indiana	Ohio
Michigan	Wisconsin

Interstate Project for
State Planning and Program Consolidation

ERIC

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Preface

Since 1968, representatives of the state education agencies of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin have participated in a regional Interstate Project funded by the U. S. Office of Education under provisions of Section 505, Title V, of the Elementary and Secondary Education Act of 1965, P. L. 89-10 as amended.

As one of a series of activities during 1971, the participating SEA Policy Committee representatives agreed to authorize a study of performance contracting in education and to produce a guide intended for practical use primarily at the local school district level. A contract was negotiated with the Minnesota Department of Education by the Wisconsin Department of Public Instruction, on behalf of the six state group, to produce this guide.

Appreciation is extended to the authors, Dr. John Adams and Karen Kitchak; Policy Committee representatives from the six states; and the many contributors and readers who have helped to bring this task to a successful conclusion. Special thanks is given to Gregory Waddick, Assistant Commissioner of Education, Minnesota Department of Education, for his leadership in this effort.

Thomas J. Stefonek, Ph.D.
Interstate Project Director
September, 1971

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Foreword

Guaranteed performance contracting is one of the most widely discussed innovations which has arisen in public education during the past several years. This approach has broad implications for pupils, teachers, administrators and the general public as a dimension of educational accountability. Because of its many ramifications, the decision to use performance contracting must be made carefully and must be based on deliberate, sound reasoning.

This publication attempts to provide a framework for evaluating the use of performance contracting and does not address the philosophical issues which local districts must resolve for themselves. Rather, it is intended to serve as a working guide for those who are considering, or have committed themselves to, performance contracts with public or private organizations. At this early date not all of the issues, problems, and potential benefits of performance contracting have been understood or perhaps even recognized. As experience and knowledge are accumulated through its use in local school districts, however, we will be in a better position to evaluate this method as one of many to improve our public educational system.

William C. Kahl, State Superintendent

Wisconsin Department of Public Instruction

Theoretical Basis and Rationale

The idea of guaranteed performance contracting cannot be isolated from the larger, more-encompassing concept of educational accountability. Accountability means answerability for results, expressed in student performance, achieved from the expenditure of specified sums of money. Guaranteed performance contracting is not synonomous with accountability, although guaranteed performance contracting can be a part of the concept. Performance contracting is a technique that can be used to achieve accountability.

The contract process is not new to education. Schools for years have let bids for a variety of products and services. Teachers have been contracted with to teach certain subjects without detailed discussion of student outcomes. Herein lies one of the new thrusts in education, a shift from the emphasis on *teaching* to an awareness that *learning* is what schools are expected to foster. A performance contract is an attempt by an educational institution to obtain improved *results* through a contractual arrangement, usually with an outside agency, with financial incentives related to specific performance standards. If these standards are not met, the school can withhold payment; however schools should be more interested in attaining results rather than in terminating the contract.

The results contracted for can be for such functions as planning, management, or improved student achievement. While most performance contracts to date deal with improved acquisition of basic skills (i.e., reading and math) some contracts involve specific vocational skills such as drafting and auto mechanics as well as achievement motivation.

While it is often difficult to specifically describe cause and effect relationships in social developments, it is apparent that guaranteed performance contracting is the outgrowth of the public's growing concern over the increased costs of education with little demonstrated effect on student outcomes. The rationale offered is that schools do not have the necessary management expertise to correct such alleged deficiencies as:

1) A large percentage of urban school children are reading well below grade level.
2) School costs are escalating without apparent increases in productivity.
3) The educational establishment is charged with being too conservative and resistant to change.
4) Schools have failed to demonstrate a great deal of success with compensatory education.

Those who propose the concept of guaranteed performance contracting offer it as a catalyst for change and suggest that the public will be given the opportunity to place the blame for failure, or to give proper recognition for success. A number of advantages that could accrue from the concept of guaranteed performance contracting have been suggested. A representative sample includes the following:

1) It may work! Students may learn more than they presently are learning, and new ways of teaching may be found.
2) Performance contracting requires people to shift their attention to results and away from inputs.
3) It forces those concerned to define what education *is* — the objectives of instruction are spelled out in detail.
4) Performance contracting provides the opportunity to make available additional expertise to the district. New developments could be made available without large expenditures for research and development.
5) The potential for objectively defining the "good teacher" is available; the "good teacher" being the one that produces results in the classroom.
6) Lastly, the expectation of success may be a strong force in changing the climate in schools where failure has been an established pattern.

Potential disadvantages to a school district resulting from performance contracting include:

1) The school district will surrender some amount of its control and autonomy to the contractor.
2) Many potential difficulties may exist with the organized teaching profession, such as violation of teacher-pupil ratios agreed to in the contract as well as transfer of teacher clauses in the contract.
3) Performance contracting may end up costing more money, or may just be add-on-money if a district is not careful.
4) Performance contracting may prove to be nothing more than a "gimmick." Early over-exposure may negate any potential gains.
5) The students may suffer from the over-emphasis on results and the basic skills (i.e., reading, writing, and arithmetic). Some affective measures of student attitudes towards themselves should probably be included in the evaluation of the programs.
6) The whole problem of retention must be considered in writing the contract. Provisions for evaluation of long-term gains should be considered.
7) "Teaching the test" may be a temptation to the contractor. This term means that the contractor violates the random selection process in writing the programs and focuses on specific items included in the post-test. "Teaching to the test" differs in that the random selection process is not violated, but that the program prepares students to do well on the post-test by including similar, but not identical times, in the program.

The Procurement Model and The Request For Proposal (RFP)

The school district's specifications, which will later be embodied in the contract, are initially spelled out in the Request for Proposal (RFP). Potential bidders are asked to respond to the conditions outlined in the RFP by submitting a proposal to the district. The steps leading to the development of the RFP are as follows:

Step No. 1

It is apparent that before a district decides to develop a performance contract several events should have occurred. First, the Local Education Agency (LEA) will have identified a problem area. This may be a problem in any of several areas such as instruction, staff capabilities, or administrative procedures. After becoming aware that a need exists, the district must identify the proper local personnel to assist in problem analysis, to provide programming ideas, to assess the relevancy of the ideas presented and of activities implied in the approaches outlined and to ascertain the concerns of various publics. This group might include representatives from all levels of school personnel, students, parents, teacher organizations, local colleges and universities, and the business community and local government. This group should then select a project director.

Step No. 2

At this point the district may wish to contract for the services of a management support group (MSG) which could provide any or all of the following services: (1) assisting with the specific needs assessments, (2) developing a number of alternatives, (3) helping with selection and implementation of the selected alternative. The functions of the MSG and a discussion of the feasibility of purchasing these services will be developed in depth in another section of this paper. Suffice it to say that for the purposes of this procurement model the district may wish to examine the possibility of such a service at this time.

Step No. 3

The third important step involves the clarification of the target population. This identification must be as detailed as possible, especially if the alternative of guaranteed performance contracting is chosen so that the contractor can make the most intelligent bid. Beyond a general statement of present deficiencies and future projections, student profiles should be determined including educational deficiencies, socio-economic and racial composition, and attitudinal and motivational data, if possible. The target area

should also be defined by educational resources, political variables, indices of community participation and effect of the program on vested interests. If it has not been done to this point the sources of funding should be specifically defined, including funds from government agencies at all levels and from non-profit organizations.

Step No. 4

The next important consideration regards the development of performance specifications. Essentially this means (a) stating the performance objectives to be achieved and (b) defining the general scope of work involved. Obviously the objectives must be directed at solving or strengthening the defined problem areas. This statement must include the following: (1) the performance objectives in terms which can be reliably, validly, and objectively measured; (2) the parameters of the work involved; and (3) the facilities and services to be provided by the district.

Step No. 5

Concurrently, while the specified group is developing a detailed Request For Proposal (RFP) the district may wish to prepare an announcement to invite bids. This letter may include the following: (1) an announcement of plans to invite bids, indicating the name of the superintendent and the name, address and telephone number of the Local Education Agency (LEA); (2) a summary of the problem and the performance to be contracted; (3) an address at which copies of the RFP can be obtained; (4) a statement of the type of contract (fixed price, cost plus, fixed fee, etc.); (5) a request for a letter of intent to submit proposal and the deadline date; (6) an indication of where and to whom to refer questions; and (7) a statement that the invitation to bid should not be construed as a contract or commitment of any kind.

Step No. 6

The heart of a successful contract is the adequacy of the request for proposal. It must have enough information so the contractor can make an appropriate bid but avoid undue restrictions which may cripple the capacity of qualified bidders to provide an innovative program. If the letter of intent suggestion is used, it may be helpful to have some informal input from contractors before the RFP is finalized. School districts should use discretion in using only those portions of significance to them, or it may be decided to include some of the standard clauses only in the final contract. Following is a detailed outline of what an RFP might include.

A. **Definition of the problem area.**
   1. The target population (specifically defined as discussed above)
   2. The number of participants.

B. **The scope of the work.**
   1. The performance objectives in measurable terms.
   2. The parameters of the work involved.
   3. The facilities and services provided by the LEA.
   4. The relationship of the contracted work with other school problems.
   5. The degree of labor intensity in the instructional program.

C. **The calendar.**
   1. The period of contractual performance.
   2. The location and date of the pre-bidders conference.

3. The deadline date for receipt of bids.
4. The date funding is available or approval expected.
5. The date a decision will be made on a bid.
6. The start-up time.

D. Definition of parties.

1. The relationship between school administration and project administration.
   a. Identification of the local project director.
2. Identification of a planning advisory group and/or MSG.
3. Identification of an arbitrator for disputes, if known.

E. Financial arrangements.

1. A statement about independent price determination.
2. Dollar parameters (maximum dollar amounts).
3. Type of contract (cost plus, fixed price, etc.).
4. Method of payment (keyed to receipt of reports).
5. A standardized itemized budget form or schedule indicating major line items.
6. The manner in which budgets are to be submitted.
7. The salary schedule of the district.

F. Policy guidelines and assurances.

1. District eccentricities; e.g., attendance requirements, specific racial mandates, etc.
2. Assurances for subcontracts.
3. Applicable state and federal guidelines and laws, e.g., equal employment opportunity clause.
4. A statement that school officials cannot benefit from the contract.
5. A covenant against contingent fees clause.

G. Evaluation procedures.

1. Identify the evaluating agency.
2. Identify the auditor, if known.
3. Specify local instructional materials and testing instruments that will be made available, if any.
4. Specify when the evaluation will be done.
5. Provide the baseline data.

H. Reporting procedures.

1. Specify the documents to be provided by the LEA for the contractor. (type, number of copies, etc.)
2. Specify reports to be made by the contractor:
   a. format
   b. frequency
   c. topics to be covered
   d. person responsible for preparing and certifying the reports.
3. Provide a systematic process for review and revision of the contract.

I. The format for the proposal (for ease of comparability in reviewing bids) and criteria to be used in evaluating proposals.

Step No. 7

A. Choosing a contractor: If it has not been done at this time, the district and/or MSG

should now identify the appropriate bidders and send them the announcement, and the RFP. There are a large number of potential bidders and it is difficult to present a legitimate list because it is a new business and a large number of firms are being developed. Once the requests for proposal have been sent the district should call a bidders conference to provide an opportunity for interested contractors to discuss the RFP with the district prior to developing a proposal.

B. **Alternative strategies in selecting a contractor:** There are alternative strategies available in selecting a contractor. The first alternative is one in which the district solicits a number of competitive bids from companies whose general characteristics best fit the district's needs. There will probably be little question of legality in this instance and the district may have the additional benefit of innovative input from which they might draw to improve the final contract. However, replying to a request is a lengthy and expensive procedure for a contractor and if there seems to be little chance of winning the contract in open competition, many smaller reputable companies may decline to bid. In addition the district should consider the time and staff necessary for careful review of the proposals received.

   An alternative to the competitive model is the sole source model wherein the district chooses at an early date a single company which it feels can meet its needs. In this procedure the company can serve a useful role in the development of the specific performance requirements, however, the district should carefully investigate the legality of this method.

   A third procedure incorporates some features of each of the preceding. Here, three or four firms are contacted and asked to submit proposals. The district then evaluates these bids and calls a conference where the contracting firms are permitted to bid against each other. One result of this method might be that the district chooses more than one of the contractors, divides the target group proportionately, and conducts research as to the feasibility of each method for the turnkey phase.

C. **Criteria in choosing a contractor:** Obviously the first factor to consider in choosing a contractor is how well the proposal matches the RFP. This decision and recommendation can come from the MSG but to avoid collusion of interests the final selection must be made by the district. A useful procedure might be the designation of an evaluation team and a checklist by which they might compare and rate proposals. The guidelines used in Dallas, Texas, include many of the elements the reviewers might consider. There should be a detailed examination of these factors: 1) presentation and organization; 2) style; 3) the technical soundness of the approach; 4) socio-political ratings; 5) subjective judgements on the philosophy of the approach; 6) pricing arrangements; 7) the past performance and ability of the company; 8) the level of organizational commitment; 9) the ability to provide all services; and 10) the quality of the equipment. These considerations and a more detailed discussion of cost analysis are developed in the section entitled, "Considerations in Selecting a Contractor."

Step No. 8

Following the selection of the contractor and prior to the implementation of the

process, the same procedure must be followed in selecting an independent auditor if the district chooses to validate the contract by that method. The role of the auditor and features of the audit contract are discussed in the section of this paper entitled "Third Party Functions."

Step No. 9

Finally, all of the involved parties must perform the necessary activities to put the contract into operation. These activities might include special construction, training of district personnel, pre-testing of students, public relations, and other problems of "lead-time" significance.

Considerations In Selecting A Contractor

The program and staff capabilities of a contractor are one of the first considerations in selecting a contractor. Who are the members of the staff? What has been their past involvement and experience? What is the reputation or "character" of the firm? What is their "track record?" What other projects have they been involved in and what were the results? Is their program a multiple- or single-linear system? There should be alternatives available so if a student fails in the method provided by the contractor they can provide alternate routes for him to follow to accomplish the objectives.

The financial capability and status of the contractor should be explained. The district should consider who is to pay the start-up costs. While there may be advantages to the district to pay the start-up costs it must be realized that with this "front-end" load the district will assume major financial responsibility if the contractor fails to deliver. The ratio of start-up costs to total cost must be considered to avoid a project which is too expensive to replicate in the district. It is also a wise idea for the district to get a Dunn and Bradstreet rating on the firm. A performance bond may also be required if there is question as to the ability of the contractor to finance the project.

Particular attention should be paid to the system for turn-key outlined by the contractor. "Turnkey" refers to the process by which the contractor turns over operation of the project to the school district. Careful thought and consideration should be used to determine if the system outlined is operable. Turn-key is essentially a performance contract for *teacher* behavior. Will the contractor guarantee some percentage of cost effectiveness one year after the project has ended?

An understanding of the motivational system used by the contractor should be gained to see if it is consistent with district philosophy. Such questions as whether the rewards are intrinsic or extrinsic should be covered. Do the incentives apply to both staff and students? How would the PTA and other groups feel about giving students "green stamps" or other rewards for achievement? The kinds of management support (such as PPBS) to determine the cost effectiveness the contractor proposes to use should be spelled out. Is the contractor himself on a PPBS operation? Or does he at least have a program which appears to be operable? If he intends to write objectives for the program has his organization written out objectives for their own operation?

The way in which the contractor handles his research and development (R&D) costs bears close examination. R&D can be either capitalized or expensed. If it is capitalized it is amortized over a period of years. If it is expensed it is charged to the period in

which the costs were incurred. From the district's point of view it is preferable to have R&D costs expensed so that the district is being charged only for the actual costs involved in their project and not paying for R&D done on previous projects. If capitalized, a rationale should be offered as to how the previous R&D costs relate to the present project.

The school district should have a clear understanding of proposed subcontracting and the necessity for it. If a large portion of the contractor's work has to be subcontracted there may be waste in high consulting fees and over-all lack of continuity in the project.

An assessment must be made as to the potential "economies of scale" involved in the project. "Economies of scale" refers to the forces causing the long-run average cost of servicing students to decrease as the contractor (or district), increases the number of students. Two important economies of scale are (1) increasing possibilities of division and specialization of labor, and (2) increasing possibilities of using advanced technological development and/or machines.

Division and specialization of labor can be achieved through application of a differentiated staffing model utilizing teacher aides and para-professionals to conduct much of the routine and clerical work and reserving the teacher's time for more professional type activities. Districts should have the contractor reveal his staffing plan in advance so that student-teacher ratios, adult-student ratios and other factors are acceptable to the school board, administrators, teachers, parents, and other relevant groups. State staffing requirements and legislated ratios must also be considered.

Economies from using technological advancements such as teaching machines and other instructional hardware offers potential for cost savings. Economists speak of education as being a "labor intensive" industry because the input of labor resources is largest relative to other resources (land, labor, capital, and management). Many writers forecast that education will become increasingly a "capital-intensive" industry with the introduction of modern technological devices. "Capital" as it is used in this sense refers to any man-made aid to production.

The potential for cost savings by moving to the use of capital resources exists because of the possibility for use of the item by additional students. The same kinds of savings are realized when class size is increased, however, this is generally not a widely-supported option.

Additional terms coming into the educational vocabulary are "consumables" and "non-consumables". These terms obviously refer to the life expectancy of items purchased. Roughly, a consumable item is one whose useful life is less than one year, and a non-consumable item's useful life is of greater duration than one year. Care should be taken by the district to see that in a highly consumable system some guarantee is made that the contractor will not increase the price of the items after the turn-key phase, and that there is some assurance that the consumable items will remain compatible with the hardware over an extended period of time.

School districts should also refrain from purchasing non-consumable materials from the contractor during the first year of the project. If the project fails, the school district is still committed to pay for the materials. A preferred way would be for the contractor to lease the equipment or materials for the first year, and allow the district to apply the leased costs toward the purchase price if the system proves to be successful.

Contractors speak of the "critical mass" needed to make a project cost-effective. The term refers to the number of students that must be involved in order for the contractor to use his system most effectively. Systems designed with a low critical mass may not offer economies of scale that could be realized from a project whose costs could be spread over a large number of students.

Of paramount importance, but often overlooked, is the involvement of the community in the planning stages. A program offered by a contractor which is unacceptable to the consumers of the service has slight chance for success.

The Contract

This section of the paper covers the content of the contract. While every contract differs in content and style, most of them have a number of common essential elements. Districts are well advised to use the services of an attorney in drawing up this legal document to safeguard the district's interests. In addition, the district personnel and/or the MSG should be aware of the specific problems which must be clarified in their contract. The following should not be interpreted as a complete or model contract but rather should be regarded as a summary of items commonly found in contracts. The format of this section will be as follows: (1) a description of what the clause contains and (2) an illustrative mock-up clause.

1. Definition of parties: This should include specification of the fiscal agent, the residency requirements, director and manager names, and any subcontractors.

> Contractor – Educational Learning Services Incorporated. Brownsville Independent School District No. 333 – the entity awarding this contract.
>
> Project Director – Mr. George Allen (or his successor designated by the district) to reside in the Brownsville district.
>
> Project Manager – Mrs. Jean Smith (or her successor, designated by the contractor) to reside in the district.
>
> Management Support Group – Management for Education, Incorporated, to provide the agreed upon number of on-site days.
>
> Auditing Contractor – Testing for Reliability, Incorporated, to provide the agreed upon number of on-site days.

2. The establishment and description of responsibilities within school and within contractor:

a) The district will appoint a Project Director and Management Support Group. The district will appoint a Project Director to oversee the project activities of the Contractors. He will be a full-time, paid employee of the district. The Project Director as the authorized representative of the district shall have general responsibilities for coordination and administration of the program with regard to the district, the contractor, the Management Support Group,

the Auditing Contractor, the local community, project personnel, parents, and student participants. The Project Director, with assistance from the Management Support Group, shall have specific responsibility for contract management; detailed record keeping; public relations; development of baseline data and continued monitoring; monitoring of the contractor costs and cost-effectiveness; initial and follow-up purchases, rental, maintenance, and replacement of equipment. The district or its designee shall provide the Project Director with all forms and procedures by which the above information is to be collected and reported. The Management Support Group will provide necessary training, development, and requisite project management assistance to the Project Director and his staff.

b) The contractor shall appoint the Project Manager subject to the prior approval of the Project Director. The Project Manager will report directly to the Project Director. He will be responsible for classroom scheduling and other administrative functions and decisions and will decide all routine matters concerning administration of the project. He will communicate his decisions to the contractor who may appeal such decision directly to the Project Director. All progress reports, position papers and other communications will be made individually by the contractor to the Project Director.

3. Definition of personnel including hiring agency, certification requirements, provision of paraprofessionals, jurisdiction of local salary schedules or fringe benefits:

The contractor shall control its curriculum, teaching aids, materials, and conduct of the Reading and Mathematics programs in accordance with the conditions of this agreement, and shall hire, train and fire its own employees, agents, or independent contractors, directly or indirectly paid by the contractor except for the Project Director and his secretary.

Teachers used in the Reading and Mathematics programs will be employed by the contractor unless the district deems it necessary to employ these teachers as regular district personnel. Upon notification by the district to the contractor, the teachers used in the Reading and Mathematics programs will be employees of and paid by the district. They will be placed in the Reading and Mathematics programs only after the contractor has signified its acceptance of these teachers in these programs. Upon notice by the contractor to the district that it desires the removal of a teacher from these programs at the contractor's sole discretion, the district shall authorize the contractor to interview potential replacements supplied by the district and to place an acceptable teacher into the Reading or Mathematics programs. The contractor agrees to reimburse the district the salary determined by the district plus the benefit costs for all teachers used in the Reading and Mathematics programs within____days after the receipt of interim payments from the district.

4. Definition of proprietory concerns such as copyrights, distribution agreements and franchises. In addition guarantees should be established for materials and prices at the time of turn-key. For example, a contractor with emphasis on non-consumables could

offer the district a lower than market price, but at the cessation of his involvement could raise the price of the materials to which the district had been committed. It should be noted that materials developed by either the district or the contractor should be protected by the same type of clause. Precautions must also be taken regarding the dissemination of information pertinent to status of the project.

The contractor agrees to hold the district harmless of all lost costs and expenses because of any infringement of copyright on instructional materials, equipment and supplies used by the contractor in the performance of this Contract.

The contractor shall give advance notice to and shall seek and obtain approval of the Project Manager prior to publishing, permitting to be published, or distributing for public consumption, any information, oral or written, concerning the objectives, results, or conclusions made pursuant to the performance of this Contract. Only the district through the Project Director shall authorize the release of any test results to the public. Such results shall be group scores or individual scores, but the names of individual students shall not be made public.

5. **Specification of funds:** including the amount and source of funding:

In this project the district will provide funds for the following:
1) Physical plant facilities.
2) M[illegible]nance and custodial services in Project Schools.
All ou[illegible]ts will be funded under ESEA, Title I.

6. **The schedule of fee payment:** This provision could become very complex covering such issues as:

1) The extent of the guarantee.
2) The nature of the reimbursement, e.g., mean gain versus individual gain.
3) Cost-plus or performance units only.
4) Reflection of incentives and penalties, and
5) Adjustment schedules.

The performance incentive measurement for establishing the unit price to be paid by the district for each student in the Reading and Mathematics programs shall be based on the results of pre- and post-test gains as measured by the standardized tests and interim performance tests established for each program. The average fixed maximum unit price based on gains in achievement level and interim performance tests shall not exceed an average of $189.75 per each student in the Reading and Mathematics programs. The total maximum incentive price for this contract for five hundred and fifty students in each year of the Reading and Mathematics programs shall not exceed $220,438.50.

Not withstanding any other provisions of this contract, the contractor shall receive interim provisional cash payments equivalent to sixty percent (60%) of the estimated total maximum contract price of $220,438,50. Provisional payments shall be separated into five (5) installment payments payable within

ten (10) days following the administration of each interim test. Each payment will be the product of $28.70 times the total number of students taking the interim tests in mathematics and reading.

Within fifty (50) days after the final post-test results are established and reported to the contractor by the auditing contractor, the contractor shall submit an adjusted final voucher stipulating the final unit price for each student in the Reading and Mathematics programs with detailed supporting information. The voucher shall state the total amounts which may be refundable to the district or additionally payable to the contractor in each program.

7. A description of the instructional program, without necessarily divulging proprietory concerns of either the district or the contractor:

The terminal performance objective is to increase, by the specific amount, the academic achievement and skills of fifth grade pupils in reading and mathematics. To meet this objective, the teaching material will predominantly use the inquiry approach, defined for the purposes of this project as scientific heuristics. It is assumed that intensive use of hardware will be inappropriate to the purpose and approach of this project.

8. Provision for changes in the program, for example, new materials which are developed:

If, during the contract period, the contractor wishes to change substantially the instructional system, materials, or equipment used, it will notify the Project Director of any such change. In no event shall the district be liable for the costs of a change to more costly instructional systems, materials, and equipment.

9. Assurances agreed upon by both parties such as non-discrimination, equality of employment, bonding, rights of students, integration mandates, the corporate status of the contractor, the state permission for the contractor: Such clauses may read as the two following standard clauses:

Recent decisions in a variety of jurisdictions, including the Supreme Court, have established student constitutional rights as against school districts, their agents, and administrative and instructional personnel. The contractor shall assume that the same constitutional prohibitions apply to it. All of the contractors actions in regard to participants in the Reading and Mathematics programs, particularily in the event of expulsion from a program, must meet constitutional requirements, especially those of procedural and substantive due process.

In connection with the performance of this contract, the contractor agrees not to discriminate against any person on the grounds of race, color, religion, sex or national origin.

10. Covenant against contingent fees. This is a standard clause to guard against any third party profiting by the selection of a particular contractor.

The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding of commission, percentage, brokerage, or contingent fees excepting bonafide employees or bonafide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach in violation of this warranty, the district shall have the right to annul this contract with liability or, at its discretion, to deduct from the contract price or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

11. Condition for termination: The contract should define the means for concluding the contract.

All obligations of the district undertaken hereunder are wholly subject to federal funds being made available to the district and committed for the purpose of this Contract, and the actual receipt of such funds by the district. In the event the funding from Federal sources is not received by the district as anticipated during the contract performance period, this Contract shall be terminated immediately upon written notice by the district to the contractor. The district shall have no further liability for costs accrued or fees earned by the contractor after the giving of such notice. Payment to the contractor for such costs accrued up to the date of termination shall be calculated on actual documented costs and payable to the contractor: (a) by applying all provisional and advance payments theretofore made to the contractor, and if there be an excess remaining, such excess will be refunded to the district; (b) if there be any balance remaining unpaid on said actual documented costs after applying such provisional and advance payments the balance shall be payable only to the extent that the district may have any remaining balance of Federal funds committed to this project, on hand, unpledged and unspent. The district reserves the right to first pay directly out of such balance of funds, if any, any obligation owing by the contractor to teachers and other personnel who were used by the contractor and assigned to the performance of the program covered by this contract.

12. Provisions for the contractor's reporting and record keeping: This clause should specify the format of reports, topics to be covered, frequency, and the person responsible for preparing and certifying the reports.

The contractor shall maintain records to reflect all actual start-up and operating costs in accordance with reasonable reporting forms and procedures established by the Management Support Group, and at specific intervals required by the Project Director for the reporting system and for such reasonable intent and purposes of the overall project as are stated in this agreement.

The contractor agrees to provide a full-time, on-site program manager who, in addition to operations for the contractor, will also be responsible to obtain such data information. The contractor further agrees to maintain the level of effort required on-site over the full contract period to assure the maximum possible educational development for each student in the Reading and Mathematics programs.

The contractor agrees to maintain books, records, documents and other evidence pertaining to the costs and expenses of this Contract (hereinafter collectively called the "records") to the extent and in such detail as will properly reflect costs, direct and indirect, of labor, materials, equipment, supplies and services, and other costs and expenses of whatever nature for which reimbursement is claimed under the provision of this contract. The contractor: accounting procedures and practices shall be subject to the approval of the Project Director.

13. Provisions for the settlement of grievances and disputes and the agency which will handle appeals: This example provides for settlement of disputes within the district. Other alternatives, however, might include outside agencies such as the National Arbitration Board.

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Project Director who shall reduce his decision to writing and furnish a copy thereof to the contractor. The decision of the Project Director shall be final and conclusive unless, within thirty (30) days from the receipt of such copy, the contractor furnishes to the Project Director a written appeal addressed to the district General Superintendent. The decision of the Superintendent or his duly authorized representative for the determination of such appeal shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute, hereunder, the contractor shall proceed diligently with the performance of the contract in accordance with the requirements of the Project Director.

14. Liquidated damages and delays and defaults: This clause should cover the contingencies of both excusable delays and defaults and preventable delays and defaults.

The contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms if such failure arises out of causes beyond the control and without the fault or negligence of the contractor. Such causes may include, but are not restricted to: acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, riots, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, but in every case the failure to perform must be beyond the control and without the fault or negligence of the contractor. If the failure to perform or make progress is a result of the failure of the contractor's subcontractor to perform or make progress, and if such failure arises out of causes beyond the control of both the contractor and his subcontractor, and without the fault or negligence of either of them, the contractor and his subcontractor shall not be deemed to be in default, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources.

15. Definition of the target population: This should be a detailed clause including how the students are selected, what data are used, what type of students are included (e.g., drop-outs, shut-outs or special students in which case the contractor might be paid extra.), and conditions for the student's retention. It should include all of the data in the RFP plus individual testing results if that was not included in the RFP. These may be specified in an appendix or attested by the independent auditor as valid.

All students in the Reading and Mathematics programs will have grade level deficiencies in Reading and Mathematics as determined by a standardized, commercially-available, achievement test to be selected and administered by the district or its designee. Students will be selected for participation by the district through random assignment from a target population pool of 1,600 students in grade 5. The district shall obtain written parental consent for students to participate in the project. No students shall be placed in the Reading or Mathematics programs who would not be eligible and accepted for instruction in regular district classes by virtue of mental or emotional deficiencies. If, during the first thirty (30) days of the program the contractor determines that a student is not qualified to participate in the program because of emotional or mental deficiencies, it may request the student's removal in writing to the Project Director. Upon the Project Director's determination, an individual test will be administered by a certified psychologist under the aegis of the Auditing Contractor. In all cases, the Project Director's decision on student participation shall then be final and binding.

Those students remaining in the Reading and Mathematics programs after the first thirty (30) day period shall remain in such programs for the full number of class days normally scheduled by the school for all students. Any student who does not remain in a program shall be the subject of inquiry and certification by the Auditing Contractor, and the reason for students leaving the programs shall be stated by the Auditing Contractor in an evaluation report. For the purpose of this contract, the following are the only bonafide reasons for a student leaving the program:

a. The student is retained in institutional care, such as in a hospital, or confined before or after trial for law violation.
b. The family moves out of the metropolitan area.
c. The student dies or is incapacitated by illness or otherwise for either a continuous period of eleven (11) days or for intermittent periods totaling twenty (20) days in any three month period.
d. The student is removed upon request of parent or guardian.

In all these cases, the contractor shall give written notice to the Project Director when in its opinion a student's absences warrant removal from the program. The Project Director shall obtain a written statement from the parent, and the validity of the stated cause shall be certified by the Auditing Contractor.

The contractor shall, daily furnish the names of any absent students to the Project Director, and the district shall use the same efforts and procedures as are used for all other students in the school district to ensure continued attendance at future sessions and at any make-up sessions which may be required. If the

student transfers to another school in the district, the district shall not be responsible for replacing such students in accordance with procedures determined by the Project Director. If regular school schedules are changed, the district will ensure that time will be provided for students in the Reading and Mathematics programs to continue to participate in these programs.

A student shall not remain in the Contractor's classes if receiving disciplinary punishment, including temporary expulsion from regular classes. The district shall inform the Project Director whenever a student receives disciplinary punishment or temporary expulsion necessitating removal from the Contractor's classes. The contractor may request the district to initiate such action for particular students based on their behavior in the Reading Mathematics programs.

16. Provision for turn-key: (defined in an earlier section of this paper).

The contractor agrees that, upon request of the Project Director, the contractor will expend a reasonable amount of effort in training local personnel in the maintenance and servicing of the contractor's proprietory equipment used in the Reading and Mathematics programs.

The contractor agrees to train or orient project management staff selected by the Project Director and the Management Support Group in the use of management techniques and approaches involved in the contractor's instructional systems.

The contractor agrees to submit in writing to the Management Support Group and the Project Director, for their use in monitoring the overall project, a management plan with specific task assignments, activities, and planning charts not later than thirty (30) days after the beginning of instruction. The contractor agrees to make available to the district on a confidential basis all internal planning and operational documents related to the conduct of the Reading and Mathematics programs, as may be deemed necessary by the district to fulfill the intent and purpose of the overall project.

17. Schedule of penalties for non-compliance, for example, penalties for teaching the test by either contractor or district personnel.

Within thirty (30) days of the commencement of the Project, the Auditing Contractor will examine the programs that constitute the contractor's curricula in Reading and Mathematics. If the Auditing Contractor finds within the materials test questions from the standardized examination being used to evaluate the contractor, it will identify these items in a written report to the contractor, in like manner, the contractor will present additional materials that it introduces for use in the project to the Auditing Contractor at least ten (10) days prior to their utilization in the project and the Auditing Contractor will identify items that are unacceptable, for the reason that such are contained in the standardized test being used for evaluation of the contractor, and report to the contractor within ten (10) days.

If, upon presentation of the instances of "teaching the test," the contractor agrees with the Auditing Contractor, then the items in question will be deleted from the curriculum. If the contractor disagreed with the Auditing Contractor, the contractor will be permitted to present its case directly to the district. Should the district agree that the materials or items in question should not be used, the contractor will immediately remove them from their materials. If the contractor fails to do so promptly, the district may consider the contractor's inaction as a breach of this Agreement.

Other provisions which may be necessary in contracts are: The term of the contract, a statement of local philosophy, a statement of the evaluation design and/or specification of test instruments; a statement of district monitoring policies; conditions for all testing; and provisions for research and development being carried on in the school.

Third Party Functions

The Independent Audit:

If performance contracting is a technique which can provide accountability, the involvement of an independent third party seems mandatory. While most districts tend to choose an independent auditor, it should be pointed out that objective accounting can be provided in at least two ways. In the first situation a district may feel that it is not capable of providing a sophisticated evaluation. In this case the district may choose to conduct the activities of an MSG itself and hire an independent evaluator whose reports furnish independent validity. A modification of this plan provided for hiring two different parties to function as the MSG and the auditor. Here, presumably the interests of the evaluator are as objective as those of the auditor but carried out on the total population rather than a sample. A third alternative is the instance where the district serves as its own MSG-evaluator, but hires measurement experts who certify the validity and appropriateness of the instruments; who may assist in the testing procedure; and who may work to develop more appropriate criterion referenced tests for the project. The district should consider these alternatives before deciding to retain an independent auditor.

Basically, the independent third party role should be designed to assure the lay board and the community that the school leaders and contractors are doing their work not just in the area of administering funds, but in terms of demonstrated results from the investment. Dr. Leon Lessinger has outlined four advantages which may accrue from the involvement of an independent auditor. They may be summarized as follows: 1) The research of the auditors may lead to more sophisticated knowledge of the relationship between inputs and outputs, i.e., the demonstrated product in terms of fiscal-human resources allocated; 2) The independent audit can form the basis for the discovery and improvement of good practice in education; 3) auditing highlights the need for work in the areas of basic academic and vocational skills; and finally, 4) it can "renew credibility in the educational process."

At this time the concept of the independent audit is encouraged by the U.S. Office of Education (U.S.O.E.). ESEA Titles VII and VIII mandate the use of an auditor and it is strongly suggested in Title III. There is an unfortunate lack of both personnel and understanding regarding the audit. Some attempts are being made to remedy this situation. For example, a non-profit organization known as the Institute for the Development of Educational Auditing (IDEA) represents an effort to advance the theory and practice of educational auditing. U.S.O.E. provides a training course leading to the certification of educational auditors. In addition a number of private agencies will contract for the position of independent auditor.

In selecting the type of independent involvement appropriate for its needs the district must be aware first of the limited number of certified auditors and second, of the lack of an official position documenting the requirements of auditors. However, IDEA states that the independent auditor must draw on a wide range of skills, including evaluation design, testing, operations research, systems analysis, information processing, performance budgeting and the various educational specialties dictated by specific projects.

Other criteria the district might use in selecting the auditor could include independence from the program, proximity to the site, and an acceptable performance record, or experience. Even though the audit contract will represent only a small percentage of the total funds, the contracting agent must make every effort to find a qualified party to assume this essential function.

W. Stanley Kruger of the U.S. Office of Education has defined the auditor's activities in terms of two stages, the developmental period and the operational period. During the first phase the auditor can first review U.S.O.E. guidelines, the preliminary proposal and draft the formal proposal. Second, the auditor should critique the proposed evaluation design. This might include determining the baseline data, the types of instruments, and the adequacy of the evaluation data to be collected. The auditor should also be sure that the evaluation will provide data on both product and process in operational and management areas. At this time the auditor may recommend revisions if he notes discrepancies between the objectives and the proposed evaluation. Third, the auditor and district should develop the audit plan and contract. Care should be taken that the contract is situation specific, clear as to purpose and types of staff services, and that the audit products are specified (e.g., reports, conferences, etc.).

The operational period can be divided into three activity phases: pre-visit, on-site visit, and post-visit. Prior to visits (which should be scheduled appropriately in terms of key evaluation activities) the auditor should have received and analyzed the evaluation documents from the local educational agency (LEA). On the basis of this information the auditor can determine the specific sampling activities and questions to be conducted during the on-site visit. The auditor should then develop the visitation schedule in coordination with the LEA.

During the on-site visit the auditor may perform any or all of the following functions. First, he will conduct sampling to verify the results of specific evaluation. This may include observation of evaluation procedures such as testing, observation of the program operation, interviewing students, parents, and staff, spotchecking tests, questionnaires, etc. and reviewing material products. Based on these findings the auditor will review evaluation data for any portion of the evaluation which has revealed discrepancies. Finally, he should determine procedures for handling the major discrepancy findings.

Post visit activities are as follows: First, preparing a preliminary audit report. This report might cover these items: general comments on the quality of project evaluation, a detailed critique of the product and process evaluation, a description of the visit

findings with a summary and interpretation of consistencies and discrepancies, recommendations for revisions in the evaluation design and confirmation or questioning of the need for program modifications which have been proposed as a result of project evaluation. This written document will probably then be presented to and discussed with the LEA. Finally, the auditor must prepare a final report summarizing the entire project which will then be submitted to the appropriate LEA personnel.

The Management Support Group:
The role of the MSG has been alluded to in this paper a number of times. The purpose of this section is to discuss the role of the MSG and second to present the possible functions an MSG may perform.

Discussion with a number of private firms and government agencies may lead the LEA to conclude that the retention of a management support group is integral to the use of performance contracting. As was stated in the section on the independent audit, it does seem most important to involve at least one outside group to lend credence and objectivity to the project. In the case of the first alternative suggested on p.28 the MSG might perform this function in its capacity as an evaluator. However, if this is the position of the MSG, care must be taken to insure their objectivity in terms of the project. In this instance the district would probably either hire an additional firm for some of the MSG activities or conduct these function itself. Before hiring an MSG the district must first analyze carefully the functions for which they may contract. Secondly, they should review the capabilities of the district to perform these activities with its own staff, and finally, come to a decision based on time and cost considerations as to whether it is more feasible to spend the money on a private firm or conduct these functions on their own. It should not be taken for granted that a full-time MSG is necessary. Alternatives might include 1) contracting with an MSG for specific, limited activities (e.g., evaluation); 2) contracting with an MSG for a number of on-site days at crucial times; or 3) contracting with an MSG for in-service training designed to develop the necessary capabilities in the district staff.

Given these alternatives, the activities of the MSG may include any, all or none of the following:

1. Conducting a detailed needs assessment prior to or during initial planning.
2. Assisting in the development of goals and objectives. These statements will form the basis of the project and should be considered very carefully. Following the needs assessment the district generally states a limited number of broad goals to meet the needs. Each goal should then be broken down into both product and process objectives. The latter refer to the task analysis of the work structure along with a time line as to when these tasks must be performed to get the project operational.
3. The development of a management system. Here the district and MSG determine who is responsible for which activities.
4. The MSG can be very helpful in developing the RFP (discussed in an earlier section) and providing a list of qualified bidders. It may also be helpful to use MSG assistance in negotiations at the pre-bidders conference, the analysis of bids, and as advisors in the selection of a contractor. In the negotiations with the

contractor the MSG can be used as an outside party protecting the district's interest.

5. The MSG can be helpful in monitoring the performance of the contract. This is a sophisticated endeavor which should monitor procedures, develop a pupil data file, provide cost figures and perform both process and product evaluation. The evaluation is a complicated procedure doing for the entire population what the auditor does on a sample basis. Basically, it must 1) provide information as to whether the objectives of the proposal are being met; 2) provide enough data so that the program can be replicated with turn-key and 3) ascertain how much is being accomplished so that the instructional contractor might be paid accordingly. It is obvious that the evaluator must be skilled in the areas of measurement, programming, data analysis and reporting procedures.
6. Finally, the MSG can be of assistance in helping the district to decide whether to assume the program at the conclusion of the contract and assisting the district and the instructional contractor in turn-key procedures.

Dr. Lessinger suggests a number of advantages to the district in contracting for management support services. First, the MSG can serve as a communication link and/or buffer between the vested interests of the community and the school system which is developing program proposals. Second, the MSG has access to new developments in the field and can assist the LEA in developing the RFP to assure that the conditions and constraints in the RFP do not preclude but encourage the opportunity for these new developments to be demonstrated. Third, the MSG can serve as a buffer between the LEA and potential bidders. Finally, the MSG can provide technical assistance during the operational stages, perhaps on an "as-needed" basis.

Legal Considerations

As the concept of performance contracting in education is articulated, and more and more school districts undertake performance contracting projects, many legal constraints and questions will arise. The purpose of this section is to provide school personnel with some of the questions and answers regarding the legal considerations in educational performance contracting. This section should not be construed as an exhaustive study of the legal aspects of performance contracting in education, rather, it should be viewed as an outline which provides several parameters within which different school districts and states must respond individually.

The first major consideration is the way in which the state education agency and/or The State Attorney General's Office view the concept of performance contracting and its many ramifications. Following is a list of questions the answers to which are specific to the individual state in which a proposed project is to be initiated.

(1) If an outside contractor is utilized by the school district for the provision of instruction and/or services for pupils, will the school district's statutory obligation for said instruction and services be fully met?

(2) Are there state or federal limitations regarding the use of State, Local, and Federal funds to support all or part of a performance contracting project?

(3) Do existing state plans for various federal programs, that may be potential funding sources for the project, permit utilization of outside contractors who will provide all or part of the instruction and/or services include in the project?

(4) Will the State Education Agency authorize credit for instruction provided by the contractor in reading or mathematics?

(5) Will the State Education Agency permit paraprofessional staff members employed by the contractor to perform certain teaching tasks under the direct supervision of a certificated teacher?

(6) Will the State Education Agency permit the teachers in the contractors program to be contractor's employees?

(7) Will an outside contractor's instructional personnel stand in *loco parentis* to the student?

(8) Are the contractor-employed teachers required to be certificated?

(9) Does a local district have authority to contract with or enter into agreements with an agency of the federal government?

(10) Does a local district have authority to contract with or to enter into agreement with private concerns for the provision of instruction?

(11) Does a local district have authority to expend state/local maintenance funds to pay for part or all of the cost of instruction provided by a private concern under contract with the district?

Experience indicates that the most effective way to have these questions answered is to prepare a brief to be sent to the State Attorney General via the State Education Agency. This brief should include a description of the proposed project and a delineation of the roles of the outside contractor and the school district.

The remainder of this section outlines some of the legal aspects of performance contracting as they effect the local districts regulations and policies. Potential considerations can be grouped into the following areas:

(1) Personnel
(2) Funding
(3) Liability
(4) Facilities
(5) Students
(6) Copyrights

Each of the above areas will be considered independently.

1. Personnel

The primary question in this area is whether project personnel (e.g., teachers and paraprofessionals) are considered employees of the education contractor or the local school district.

If personnel are considered contractor employees, and have been previously employed by the local district, certain benefits such as retirement, teacher association insurance, etc. would be either lost or discontinued. Another related question is whether the contractor should be required to provide an equal level of benefits to personnel in the program as a comparable district employee receives. One possible solution to this dilemma is for district personnel selected for inclusion in the project to take a leave of absence thus retaining the option to return to the district without losing tenure or other accrued benefits.

Existing district employment compensation rates, particularly where established through union negotiations, will be a constraint on the education contractor who may wish to use an incentive–penalty compensation scale based upon student achievement. This problem must be negotiated with the teacher union and/or the education contractor.

The majority of states have not yet set accreditation standards for instructional aides and paraprofessionals. As a guide, education contractors should be required to follow the regulations concerning salary, educational background and experience requirements already in existence within the district.

Some minimum requirements must be met in most instances regardless of whether the project personnel are employed by the education contractor or the local district. These are (1) employees must be selected without discrimination pursuant to Executive Order No. 11246, September 24, 1965, and (2) the education contractor or local district meet all requirements under that act including minimum wage standards and (3) all health certificates, X-rays, vaccinations, etc. required by the district should also be required of the education contractor.

2. Funding

The district should consider what allocations are allowable in a special learning facility for instructional managers and aides.

Federal funds are available for performance contracts with outside private education contractors under the Elementary and Secondary Act (P.L. 89-10) Titles I, and VII, and Executive interest in the general area has been recently expressed (see President Nixon's March 3, 1970, message on education). The only qualification regarding the use of federal funds is that ultimate control of the project must remain in the hands of the local education agency.

One possible constraint to the continued use of Title I funds involves recently issued guidelines for ESEA Title I. Basically, these guidelines require that state and local funds must be spent to provide comparable services among all schools. Only then can Title I funds be used to provide supplementary services in schools qualified for Title I projects. The question arises whether State and Local funds spent on a learning facility which does not have comparable resources, (higher pupil–teacher ratio, more instructional hardware, longer hours of facility utilization) will violate those guidelines. This question will require decisions at several levels; which so far have not been forthcoming.

3. Liability

There are three general areas of liability other than the general contractual liability of both parties: (a) facilities use during "regular" and "after" school hours; (b) student travel to and from the learning center facility and (c) liability of the district, the education contractors, and instructional personnel. Following are some suggestions regarding these three areas:

(a) Careful consideration should be given the area of liability during contract negotiations between the local district and the education contractor. Agreements should be reached on such variables as insurance, policy dollar amounts, and responsibility for payment of premiums.

(b) The educational contractor and his personnel should owe the same duty and obligations as does the regular local district personnel. During after hours use of facilities there should probably be a joint liability to both personnel and students.

(c) Within the confines of the learning center, the education contractor should assume the liability. Travel to and from the learning centers should be a joint responsibility of district and education contractor.

(d) As mentioned, liability should be negotiated, and should be stipulated in the contract. Although instructional personnel may be full-time education contractor employees, the local district should consider assumption of liability for the employees. This appears to be more desirable from both a political and legal vantage point.

4. Facilities

The most important consideration in this area is whether or not the facility or classroom which houses the education contractor's program should be considered a school facility. Many education contractors need extensive electrical wiring for their technology; sometimes requiring a separate facility (mobile learning units) designed to meet their specific needs. The question remains as to whether outside facilities utilized by the contractor should be viewed as school facilities. A suggestion is that all contractor facilities regardless of the acquisition arrangement (e.g., lease, buy, etc.) be designated as local school facilities and that these facilities be accorded the same benefits (e.g., insurance) as other school facilities.

The local district and the education contractor should agree on general maintenance charges, facility code requirements and safety requirements. All equipment installation and classroom modifications should be made in accordance with district policy.

It should be anticipated that the facility will be utilized during "other hours"; this "other hours" clause includes before and after school use of facilities for student make-up work. Other hour utilization is desirable for both parties, however, a definition should be drafted stipulating the nature and responsibilities of such use.

5. Students

Selection of target student participants and instructional personnel cannot be made on the basis of race, nor can assignment to facilities be made on the basis of race. Since in most projects, students will be in regular district classes the majority of each day, the structure of these classes should be the controlling factor, presuming the classes are within desegregation guidelines. Within the contractor operated learning center, if the racial composition of classes deviates substantially from the average racial composition of the local district schools, there may be some problem under current court decisions and federal guidelines. However, the fact that accelerated upgrading hastens the process of effective desegregation should counter arguments as to the intent and consequences of the project.

A special and fast evolving area of concern involves the local district codes for student conduct, penalties for violation, and responsibility for enforcement. An agreement

should be reached between the education contractor and the local district as to student rights within contractor operated facilities. The question, in essence, is who dictates policy within the contractors operated facility, the school district or the contractor.

It should also be understood that state or federal laws or constitutional provisions may restrict the extent to which such things as tort liability, rights of students, and other legal obligations may be negotiated at all. It is possible, for example, that an agreement that the contractor assume liability for certain torts, or responsibility for administering penalties for violations of rules of student conduct, might be invalidated by a statute or court decision which prohibits the school district from contracting away such obligations.

The local district and the contractor should also negotiate the authority to remove a student for disruptive conduct. A related area is the relationship between the contractor's project director and the principal of the school in which the project is housed. This is a particularly sensitive area and the obligations and authority of each should be enumerated in the contract document.

6. Copyrights

After the selection of the education contractor, the district should be able to ascertain which materials are developed and copyrighted and which materials will be developed during the operation of the project. The district should then negotiate with the contractor over the copyrighting of materials, the production and testing of which would be underwritten by the local district. The local district should be able to share in the royalities or benefits accruing from a developmental effort in which they in part fund. This concept is analogous to Leon Lessinger's concept of "Developmental Capital" in which a school district through developing needed educational products can share them with other districts and receive some compensation; this concept indeed inspires innovation.

The legal and policy constraints in education performance contracting are many and varied. The success of performance contracting in fostering innovative practices in education rests on the integrity between business and education. Realizing this fact increases the need for careful consideration of the legal and policy ramifications.

Summary of
National Performance Contracting Activities

With the number of schools and school districts engaging in performance contracting growing daily it is beyond the scope of this report to attempt a complete listing of all of the performance contracting activities. The Rand Corporation was awarded a $300,000 contract by the U.S. Office of Education to do a comprehensive study of performance contracting activities. An interim report due in mid-1971 should provide a comprehensive listing of activities which has not been available to date.

A valuable resource person at the Office of Education is Mr. Albert Mayrhofer, in the Bureau of Elementary and Secondary Education. He has had extensive experience in helping school districts who are contemplating entering into a performance contract.

A list of the Office of Economic Opportunity performance contracts follows:

Office of Economic Opportunity Contracts

School District	Contract Value	Contractor
Portland, Maine	$ 308,184	Singer/Graflex Corporation
Rockland, Maine	299,211	Quality Education Development
Hartford, Connecticut	320,573	Alpha Systems, Incorporated
Philadelphia, Pennsylvania	296,291	Westinghouse Learning Corp.
McNairy County (Selmer,) Tennessee	286,991	Plan Education Centers, Inc.
McComb, Mississippi	263,085	Singer/Graflex
Duval County (Jacksonville) Florida	342,300	Learning Foundations, Inc.
Dallas, Texas	299,417	QED
Taft, Texas	243,751	Alpha
Hammond, Indiana	342,528	Learning Foundations
Grand Rapids, Michigan	322,464	Alpha
Fresno, California	299,015	Westinghouse
Seattle, Washington	343,800	Singer/Graflex
New York (Bronx), New York	341,796	Learning Foundations
Clarke County (Athens), Georgia	301,770	Plan Education
Las Vegas, Nevada	298,744	Westinghouse
Witchita, Kansas	294,700	Plan Education
Anchorage, Alaska	44,632	QED
TOTAL	$5,649,252	

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